Practical Considerations for Issuing Personal Protection Orders

CHAPTER 7

In This Chapter...

7.1 Chapter Overview

This chapter explores some of the practical problems that arise in issuing PPOs.* This chapter discusses:

*The PPO statutes are MCL 600.2950 (domestic relationship PPO) and MCL 600.2950a (non-domestic stalking PPO).

- Accessibility of PPO proceedings to unrepresented parties.
- Management of ex parte proceedings.
- Promoting safety.
- Due process concerns with ex parte orders that interfere with constitutionally protected rights.
- PPOs and access to children.
- Responses to frustrating behavior by the parties in PPO proceedings.

The substantive and procedural requirements for issuing a PPO are the subject of Chapter 6. Enforcement proceedings are discussed in Chapter 8.

Michigan's PPO statutes give judges a flexible, potentially far-reaching tool to address domestic violence. Because the statutes allow the courts such broad discretion, and because the scope of this discretion has not been clearly defined by the state's appellate courts, a variety of practices has arisen in issuing PPOs throughout the state. The Advisory Committee for this chapter of the benchbook believes that each court must adopt practices that are compatible with its interpretation of the PPO statutes and with the resources available within its particular community. Recognizing that opinions and circumstances vary, the Committee offers the suggestions in this chapter to promote uniformity of PPO practice where this is possible and to stimulate discussion as courts develop consistent local policies regarding PPO issuance.

The suggestions in this chapter come from several sources.* Many are drawn from the personal experiences of members of the Advisory Committee for this chapter of the benchbook and represent their best professional judgment on

*Other sources not noted here will be referenced in the text.

issues that have not been addressed by the Michigan Legislature or appellate courts. Other suggestions are taken from experiences recorded in other states:

- *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (National Center for State Courts, 1997) (hereinafter cited as "NCSC Study"). The authors of this study sought to discover factors influencing the effectiveness of civil protection orders by interviewing women who received protection orders in the Family Court in Wilmington, Delaware, the County Court in Denver, Colorado, and the District of Columbia Superior Court.
- Finn and Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (National Institute of Justice, 1990) (hereinafter cited as "Finn & Colson"). The authors of this study describe various court practices that have proven effective in combatting domestic violence. These descriptions are based on the authors' review of state statutes and case law regarding civil protection orders in all 50 states, interviews with judges and victim advocates, and examination of nine court sites nationwide that were reported to have taken effective approaches to protection orders.
- Herrell and Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 1 (1990) (hereinafter cited as "Herrell & Hofford"). The recommendations listed in this study were adopted as official policy by the National Council of Juvenile and Family Court Judges in July 1990. These recommendations are based on experiences gathered by the Council's Family Violence Project, which operated family violence intervention projects at courts in Portland, Oregon, Wilmington, Delaware, and Quincy, Massachusetts.

7.2 Making PPOs Accessible to Unrepresented Parties

*Some suggestions in this section are taken from Tennessee Domestic Abuse Benchbook, p 81-82 (Tenn Task Force Against Domestic Violence, 1996).

Most parties to PPO actions appear pro se, and Michigan's courts have taken a variety of approaches to making the proceedings accessible. Many courts supplement their efforts in this regard by relying on the assistance that local service organizations can provide to pro se litigants — local bar associations, domestic violence service agencies, and domestic violence coordinating councils often provide information and assistance to unrepresented parties who are involved in a PPO action. The following suggestions assume that pro se litigants who have received clear, accurate information about the PPO process will be most likely to make proper, effective use of it. Court staff and community service organizations can best convey this information to pro se litigants if they have received clear direction from the court about the PPO process and their roles in assisting litigants with it.*

A. Explaining the Proceedings Clearly

Clear explanations of PPO proceedings can promote proper use of this remedy. The parties need information about the following subjects:

- What a PPO can and cannot do.

- Eligibility requirements for each type of PPO.
- Procedures for obtaining a PPO.
- Procedures for hearings scheduled in PPO actions.
- Procedures for serving a PPO and entering it into the LEIN system.
- Procedures for modifying or terminating a PPO.
- Procedures for appealing a court's decision to grant or deny a PPO.
- Consequences of violating the PPO.
- Where the PPO is enforceable.
- Procedures for enforcing a PPO after an alleged violation.

Explanations can be given verbally by well-trained court personnel, or in written materials designed for use by unrepresented parties. In areas where many residents do not speak English well, some courts have provided written materials in the languages of these residents. Some Michigan courts provide videotaped explanations of PPO proceedings for parties who cannot read well.

Note: Caution should be exercised before allowing a friend or family member to act as an interpreter for an abused individual who does not speak English. The abused individual may not discuss domestic violence when these persons are present for fear that they may disclose the conversation to the abuser or for fear that the information presented may endanger the interpreter. In some cases, the interpreter might not want the violence to be disclosed and may not accurately convey the abused individual's statements to the interviewer.*

*See Section 2.5 on cross-cultural communication.

The Michigan Judicial Institute has prepared *Staying Safe: A Guide to Personal Protection Orders,* a 16-minute videotape that is designed for courts to show to PPO petitioners. This videotape explains the nature of a PPO, the procedures for obtaining one, and the methods of service on the respondent once it is issued. Safety tips are also presented. It is available in English, Spanish, and Arabic, and comes with close-captioning. An accompanying brochure is also available in English, Spanish, Arabic, and Braille. Copies may be obtained by contacting the Michigan Judicial Institute at 517-373-7171 or at www.courts.michigan.gov/mji/resources/videotapes.htm (last visited March 5, 2004).

B. Using Domestic Violence Service Agencies

Although domestic violence victim advocates may not represent or advocate for domestic violence victims in court, courts may provide advocates to assist petitioners in obtaining a PPO. A court may use the services of a public or private agency or organization that has a record of service to victims of domestic violence to provide the assistance. MCL 600.2950c(1)-(2). Advocates may provide several types of assistance, including, without limitation:

> "(a) Informing a victim of the availability of, and assisting the victim in obtaining, serving, modifying, or rescinding, a personal protection order.
>
> "(b) Providing an interpreter for a case involving domestic violence including a request for a personal protection order.
>
> "(c) Informing a victim of the availability of shelter, safety plans, counseling, other social services, and generic written materials about Michigan law." MCL 600.2950c(1).

Advocates rendering assistance in accordance with MCL 600.2950c do not violate statutory prohibitions against the unauthorized practice of law. See MCL 600.2950c(3) and MCL 600.916(2). To the extent they are not already protected by the governmental immunity provisions of MCL 691.1401 et seq., advocates acting pursuant to MCL 600.2950c are presumed to be acting in good faith and are not liable in a civil action for damages for acts or omissions in providing assistance, except acts or omissions amounting to gross negligence or willful and wanton misconduct. MCL 600.2950b(5).*

*This statute also states that its presumptions regarding advocates do not apply to court employees.

Domestic violence service agencies may employ paid staff members or rely on volunteers. These workers are typically trained in domestic violence issues and help abused individuals to avail themselves of community resources. Appropriate assistance from a domestic violence victim advocate can often expedite the court's response to a violent situation. An advocate's help in filling out a PPO petition form, for example, can eliminate the delays that occur when such forms are improperly completed.*

*Finn & Colson, *supra,* p 24-26. For more general information about domestic violence service agencies, see Section 2.2.

In addition to the assistance listed in MCL 600.2950c(1), domestic violence service agencies can perform the following services:

- Accompanying petitioners through the filing and hearing process. But see MCL 600.2950c(2), prohibiting domestic violence victim advocates from representing or advocating for victims in court.
- Providing information about court proceedings and preparing the petitioner for the proceedings.
- Explaining the available relief and the limitations of the protection order.
- Arranging to have witnesses appear with the petitioner.
- Notifying petitioners of their duty to attend hearings.
- Identifying cases in which attorney assistance is essential.

Domestic violence victim advocates can best perform their services when they have a clear understanding of the scope of their duties in assisting with court proceedings. If advocates receive clear judicial direction as to the role they perform in the PPO process, they will be less likely to overstep their authority or engage in the unauthorized practice of law.

C. Pro Bono Representation

Although the Legislature intended that Michigan's PPO proceedings would be accessible to unrepresented parties, some cases may be so complex that the parties would benefit from attorney assistance. For example, unrepresented parties may be well advised to seek legal advice in cases involving disputes over custody or parenting time, or in cases where enforcement is sought by way of a show cause proceeding. Judges can promote access to counsel by encouraging pro bono attorneys and legal aid organizations to place a high priority on such cases. Such encouragement may take the form of attendance at local bar meetings, or the organization of training clinics for members of the bar.

> **Note:** A sitting judge may engage in activities designed to promote and encourage attorneys to provide pro bono legal services. However, the judge should not directly solicit individual attorneys to provide pro bono services to specific persons. Formal Opinion J-7 (January 23, 1998). See also Michigan Code of Judicial Conduct, Canon 2, 4 (A)-(C), 5(B), MRPC 6.1.

D. Training for Court Staff

Assistance from court clerks is essential, particularly when victim advocates and attorneys are not available. MCL 600.2950b(4) provides:

> ". . . Upon request, the court may provide assistance, but not legal assistance, to an individual in completing [PPO forms] and the personal protection order if the court issues such an order, and may instruct the individual regarding the requirements for proper service of the order."

Court clerks and other staff members can most effectively perform their duties when they are properly trained and supervised in handling PPO petitions. They need clear, written instructions, including firm directions to refrain from evaluating the parties' credibility or giving legal advice. To prevent burn-out, one study suggests that clerks be given adequate time to fulfill their responsibilities. Burn-out can also be avoided if clerks periodically rotate into other tasks.*

*Finn & Colson, *supra*, at 27.

> **Note:** The Michigan Judicial Institute has produced *The Court Staff Guide to PPOs,* an interactive compact disc program on personal protection orders that is designed to inform court support personnel about their duties in personal protection actions. In addition to information about the relevant law governing PPOs, this program addresses the nature and dynamics of domestic violence, techniques for working with people who are subject to the trauma caused by violence, and principles for providing assistance to unrepresented parties without giving legal advice. An accompanying written reference guide is also available. On the

general scope of clerks' duties to provide information to the public, see MJI's training program on interactive compact disc entitled *"I'm Sorry, I Can't Give Legal Advice."* For more information, contact the Michigan Judicial Institute at 517-373-7171 or visit www.courts.michigan.gov/mji/ (last visited March 5, 2004).

E. Conducting PPO Proceedings

Giving docket priority to cases involving domestic violence can promote safety by allowing the court to timely intervene in abusive behavior. Once a scheduled hearing has begun, however, the court might find it helpful to slow the pace of the proceedings to allow time for adequate explanations to unrepresented parties. If it appears obvious that an unrepresented party cannot function in his or her own best interests, the court might permit a continuance to allow the party to seek legal assistance.

A court can sometimes expedite proceedings involving unrepresented parties by clearly explaining at the outset what is taking place and what information is needed to make a ruling. Setting limits in this way may help to guide the parties away from digressions into extraneous information. If a party digresses, the court can show sensitivity to the situation by acknowledging that the irrelevant information might be important in another context (e.g., in a counseling session, or in another court proceeding). In this situation, some judges provide information about other community resources that can offer appropriate assistance.

Abusive behavior may sometimes occur in the court's presence during PPO proceedings. See Section 1.5 for discussion of abusive tactics.

Note: Canon 3(A) of the Code of Judicial Conduct provides as follows:

> "(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
>
> . . .
>
> "(10) Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court."

F. Respondents Who Are Subject to Criminal Prosecution

If an unrepresented respondent in a PPO proceeding is subject to an ongoing criminal prosecution, the court must be cognizant of his or her constitutional rights. The Advisory Committee for this chapter of the benchbook suggests:

- Advise the respondent of the right against self-incrimination.
- If the respondent is represented by an attorney in the criminal prosecution, notify the attorney regarding the PPO proceeding.

The court is not required to appoint counsel for unrepresented respondents upon issuance of a PPO; however, the respondent has a right to counsel if contempt proceedings are initiated after the alleged violation of a PPO. See Section 8.4 on due process protections in contempt proceedings.

7.3 Managing Ex Parte Proceedings

This section describes practice alternatives adopted by some Michigan courts in managing ex parte PPO proceedings. For discussion of the substantive and procedural requirements for issuing ex parte PPOs, see Sections 6.3(C), 6.4(D), and 6.5(C).

The PPO statutes and court rules do not require the petitioner to appear on the record before the court to obtain an ex parte PPO, and Michigan practice varies in this regard. The specific facts in support of an ex parte order must be shown by verified complaint, written petition, or affidavit, and some courts rely on these documents as the sole basis for its decisions on ex parte petitions. See MCL 600.2950(12), MCL 600.2950a(9), and MCR 3.705(A)(2). Other courts require the petitioner to appear on the record before it will issue an ex parte PPO. If a court considers information that is not contained in a written complaint, petition, or affidavit, MCR 3.705(A)(2) provides that "[a] permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order."

The Advisory Committee for this chapter of the benchbook suggests that courts decide on a case-by-case basis whether to go on the record in ex parte PPO proceedings. Courts that base the decision solely on the petitioner's written documents note the following advantages to this practice:*

*See Finn & Colson, *supra*, p 27-28.

- Issuing an ex parte PPO based solely on the allegations in the petition avoids due process problems that might arise if the PPO were issued based on verbal allegations not appearing in the petition. If all the allegations on which the PPO is based appear in the petition, the respondent will have adequate notice of the proceedings when the petition is served. (Courts who follow this practice are liberal in permitting amendment of inadequate petitions.)

- Issuing an ex parte PPO based solely on the allegations of the petition speeds the process. Saving time may be important in situations where delay would be dangerous to the petitioner.
- Requiring a court appearance could cause delay and inconvenience to the petitioner in large, multiple-county circuits where a judge is not always present at the location where the petition is filed.
- Requiring a court appearance could intimidate certain petitioners, perhaps deterring them from filing a PPO petition.

*See Section 7.2(B) for more information about the role of domestic violence victim advocates in PPO proceedings.

Note: The Advisory Committee for this chapter of the benchbook suggests that if the court does not go on the record with the petitioner and denies ex parte relief, the required written statement of its reasoning should also advise the petitioner of the right to request a hearing. See MCR 3.705(A)(5), which excuses the court from giving notice of the right to a hearing where ex parte relief is denied only if it has "interviewed" the petitioner and determined that the petition does not merit a hearing. To save time and to avoid abuse of the PPO process, the Advisory Committee further suggests that courts issuing ex parte PPOs without requiring the petitioner's appearance on the record consider enlisting the aid of trained domestic violence victim advocates to assist in filling out the PPO forms.*

Courts that go on the record with the petitioner before issuing an ex parte PPO cite the following advantages to this procedure:

- The court can question the petitioner to determine what dangers may exist and what provisions are necessary to provide adequate protection.
- The court can assess the petitioner's credibility or otherwise resolve doubts about the factual allegations on which the PPO would be based.
- The court can assess any visible injuries to the petitioner. A court's written findings in this regard may be important in subsequent hearings or other court proceedings that take place after the injuries have healed.
- The court can inform the petitioner of the importance of appearing at any hearing held after issuance of the ex parte order.
- The court can answer the petitioner's questions about court proceedings and provide explanations for petitioners who may not have fully understood the written information provided by the court.
- The court can explain to the petitioner what will happen if the respondent violates the order.
- The court can provide support to the petitioner's efforts to end the abuse by assuring the petitioner that abusive behavior is not acceptable.

Note: If the PPO is issued based on allegations not appearing in the written petition, the Advisory Committee for this chapter of the benchbook suggests that the court permit amendment of the petitioner's affidavit after the hearing to include these allegations.

One federal court has stated that a petitioner's appearance before the court on the record is not a due process requirement in proceedings to obtain a civil protection order against domestic violence. In *Blazel v Bradley*, 698 F Supp 756, 764 (WD Wisc, 1988), a party excluded from his home by an ex parte civil protection order challenged the Wisconsin domestic abuse proceeding on due process grounds, in part because the petitioner was not required to appear personally before the issuing judge. The federal district court held that the procedures set forth in the Wisconsin protection order statute comported with due process. The court noted: "Although it might be a better procedure for the presiding judge . . . to require the petitioner to appear personally before the court so that the court may evaluate petitioner's credibility and perhaps see physical evidence of abuse such as bruises or scratches . . . a personal appearance is not a constitutional requirement." For more discussion of due process issues, see Section 7.5.

7.4 Promoting Safety in PPO Provisions

In the following discussion, the Advisory Committee for this chapter of the benchbook offers suggestions for drafting PPO provisions that promote safety. One important step a court can take to promote safety in PPO proceedings is to become informed about the nature of domestic violence. This subject is treated in Chapter 1 — the lethality factors listed in Section 1.4(B) are of particular importance.

A. Give the Abused Individual All Available Legal Remedies

Under Michigan law, a domestic violence victim is not required to choose between civil and criminal remedies as means of protection. Michigan law specifically states that a personal protection order can be obtained regardless of whether a criminal action against the respondent is pending. See MCL 600.2950(23), MCL 600.2950a(20), and MCL 750.411h(5), which provide that steps taken to enforce a PPO do not foreclose arrest or prosecution for criminal offenses arising from the same conduct. Accordingly, the existence of a PPO should have no bearing on the decision to proceed with criminal prosecution, and the pendency of criminal proceedings should not prevent the court from issuing a PPO under appropriate circumstances. Indeed, one study suggests that a combination of civil and criminal remedies may be necessary to prevent abuse, particularly where the abuser has a prior history of criminal behavior.* The National Council of Juvenile and Family Court Judges states:

*NCSC Study, *supra,* p 56-58. On double jeopardy concerns in cases where conduct violating a PPO also constitutes a separate criminal offense, see Section 8.12.

> "Requiring victims to choose between civil and criminal processes deprives them and the state the ability to fully protect victims and other family members, including children, from violent family members. The denial of criminal prosecution reinforces the rationalization of abusers that family violence does not constitute a crime, and worse, is the fault of the victim. The denial of civil processes leaves victims extremely vulnerable while awaiting trial. Victims of child abuse and neglect should also have equal

access to the criminal and civil courts. Cases should be combined or coordinated." Herrell and Hofford, *supra,* p 7.

In domestic relations proceedings, the issuance of a domestic relations order, divorce judgment, order for separate maintenance, or decree of annulment does not preclude the court from also issuing a PPO to protect one of the parties from the other. See MCL 552.14(1) and MCR 3.207(A), which specifically authorize courts to issue PPOs incident to domestic relations proceedings. Indeed, the extra safety measures that are attendant to a PPO may make it a necessary supplement to the relief otherwise provided in a domestic relations action. See Section 10.7 for a comparison of PPOs with domestic relations orders issued under MCR 3.207. Questions concerning PPOs and access to children are addressed at Sections 7.7 and 12.5(B).

B. Fully Explain the Relief Provided in the Protection Order

*Finn & Colson, *supra,* p 33, 42 and Herrell & Hofford, *supra,* p 17.

Effective protection orders fully specify the precise conditions of relief granted to the petitioner. Specific orders limit opportunities for manipulation by making the court's requirements clear. Specific orders are also easier for the police and other courts to enforce in the event of violation.* In specifying the relief granted in a PPO, the court might consider the issues in the following discussion.

1. Descriptive Information

Complete descriptive information allows law enforcement officers to accurately identify the petitioner, respondent, and any other persons protected by the PPO. Descriptions for protected locations should also be as complete as safely possible. Descriptive information might include:

*On LEIN entry, see Section 6.5(F).

- Information required for LEIN entry.*
- Respondent's date of birth, scars, hair color, approximate age, vehicle descriptions, license plate numbers, etc.
- Where the order prohibits contact with persons other than the petitioner (e.g., with the petitioner's children), descriptive information for those persons (e.g., names and birth dates).

*See Section 7.4(C) on protecting the petitioner's address.

- The places where the petitioner or other protected persons are vulnerable to abuse. These might include home, school, or work locations, and parking lots at these locations. If there is no safety issue requiring that the petitioner's address be kept confidential, the order should give specific addresses.*

For a case illustrating the importance of clear drafting, see *People v Freeman*, 240 Mich App 235 (2000). In this case, the court listed two different addresses for the petitioner in the body and caption of the order. One of these addresses was the respondent's residence, which he maintained separately from the petitioner's residence. The Court of Appeals noted: "Surely, a defendant must question the wisdom of an order that makes it a violation of a court order to be in his own home, particularly when the complainant has a separate

residence and makes the complaint to the police while at defendant's residence. This would appear to allow personal protection orders to be used as a sword rather than a shield, contrary to the intent of the legislation that was quite properly designed and intended to protect spouses and others from predators. When personal protection orders are allowed to be misused due to careless wording or otherwise, then the law is correspondingly undermined because it loses the respect of citizens that is important to the effective operation of our justice system." 240 Mich App at 237, n 1.

2. Types of Contact Prohibited

To prevent the parties from manipulating an ambiguous order, a PPO should clearly specify the types of contact restrained. The order might address:

- Whether the respondent should be restrained from entering the petitioner's home or other premises. The National Council of Juvenile and Family Court Judges recommends that if a court must separate parties who are living together, it should remove the abuser from the home and allow the abused individual and children to remain with appropriate provisions for protection. The Council recommends this practice even if the home legally belongs to the abuser because it "gives a clear message to the offender that such behavior will not be tolerated regardless of who holds legal title, and that the state intends to protect victims from further abuse." The Council further notes that requiring an abused individual to vacate the home does not deter criminal behavior. Instead, it may reward the abuser for a crime and discourage an abused individual who has no alternative housing from seeking needed protection.*
- How a respondent who has been excluded from premises may obtain his or her property from the premises. Provisions for removal of the respondent's property should specify a date and time for removal. In appropriate cases, the court might consider providing for removal under police supervision.
- Whether the respondent should be prohibited from telephone, mail, or electronic contact with the petitioner.
- Whether specified people acting on the respondent's behalf (e.g., the respondent's parents) must refrain from contacting the petitioner.
- Whether or not the parties may meet together in the presence of their attorneys.

*Herrell & Hofford, *supra,* p 18. See also Attorney General's Task Force on Family Violence, p 43, (Final Report, 1984). See Section 7.5(A) on due process concerns with such orders.

3. Access to Weapons

The presence of firearms or other weapons can greatly increase the lethal potential of domestic violence. If weapons are to be removed from the home or the respondent's possession, it is helpful to give specific instructions for doing so to prevent the parties from manipulating the order. Such instructions might provide for the police to remove weapons from the respondent's home, or specify a time and place for the respondent to turn them in.*

*See Sections 1.4(B) on lethality factors and 9.7-9.8 on firearms disabilities resulting from entry of a PPO.

4. To the Extent Permitted by Law, Access to Children of the Relationship

*NCSC Study, *supra,* p 51, n 95. See also Section 1.7(A).

The safety of an abused individual may be inextricably linked with the abuser's access to children of the relationship. Abusers often use the children in the household to control their partners. In its study of civil protection orders issued in three jurisdictions, the National Center for State Courts reported that petitioners with children were more likely than childless petitioners to experience enforcement problems with their orders.* The study authors believed that petitioners with children reported more problems because they were more likely to come into contact with the respondent for purposes of child visitation. The most frequently reported child-related problems involved abuse when children were exchanged for visitation and respondents' threats to keep the children. See Section 7.7 for more discussion of PPOs and access to children.

5. To the Extent Permitted by Law, Financial Support for the Petitioner and Family Members

*See Section 1.5.

Abusers often manipulate the household finances to control their partners.* Accordingly, it is not uncommon that an abuser who has been excluded from premises will seek to maintain control by refusing to make mortgage, utility, or other payments necessary to support a partner and children who remain on the premises. The extent to which the court can respond to this type of abuse in a PPO is probably limited, for the PPO statutes do not specifically authorize provisions regarding family support. In rare cases, the "catch-all" provision in MCL 600.2950(1)(j) might afford relief from severe financial abuse that "imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." In general, however, a PPO is intended for situations in which imminent physical assault or other injury is anticipated due to one party's acts of domestic abuse.

If the petitioner experiences financial intimidation, the court might consider the following other authorities:

*See Chapter 11 on support.

- Prior court orders for support.* If the respondent's behavior violates a prior court order for support, the petitioner should seek relief on the basis of this order. The PPO might restrain the respondent from violating the provisions of the prior order, which could be incorporated into the PPO.
- The Family Support Act, MCL 552.451 et seq. In cases where no divorce or separate maintenance proceedings are pending, this legislation authorizes an action in circuit court for support brought by "[a] married parent who has a minor child . . . living with him or her and who is living separate and away from his or her spouse who is the noncustodial parent of the child . . . and who is refused financial assistance by the noncustodial parent to provide necessary shelter, food, care, and clothing for the child . . . if the spouse is of sufficient financial ability to provide that assistance . . . ." MCL 552.451.

See also Section 3.14(B)(4) on criminal sanctions applicable to desertion and non-support.

C. Protect Information Identifying the Petitioner's Whereabouts

1. Addresses in Court Documents

Persons subjected to domestic violence are at increased risk when their abusers have ready access to them by knowing their whereabouts. Therefore, a petitioner in a PPO action may be endangered by court documents that identify his or her work or residence address.* Michigan's PPO statutes and court rules permit petitioners to omit their residence addresses from court documents as long as they provide a mailing address. MCL 600.2950(3), MCL 600.2950a(3), and MCR 3.703(B)(6).

*Tennessee Domestic Abuse Benchbook, p 58 (Tenn Task Force Against Domestic Violence, 1996). Lethality factors are discussed at Section 1.4(B).

Where the petitioner is in hiding, the court should take care not to inadvertently disclose an address that would permit the respondent to locate the petitioner. In such instances, the court's order might state that the respondent must stay away from the petitioner's residence, without revealing the location of the residence.

A more extensive discussion of confidentiality in court records is found in Sections 10.4 - 10.5 and 11.4 (regarding domestic relations proceedings) and Section 4.16 (crime victims' identifying information).

2. Protecting Addresses in Children's Records

MCL 722.30 states that non-custodial parents must have access to information in children's records in the absence of a protective order issued by a court:

> "Notwithstanding any other provision of law, a parent shall not be denied access to records or information concerning his or her child because the parent is not the child's custodial parent, *unless the parent is prohibited from having access to the records or information by a protective order*. As used in this section 'records or information' includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education." [Emphasis added.]

Abusers sometimes find their partners who are in hiding by obtaining addresses from children's school, day care, medical, or dental records. For this reason, some abused individuals fail to enroll their children in school or to seek medical care for them to remain in hiding from their abusers. In situations like these, a domestic relationship PPO can prohibit a person from obtaining access to identifying information in children's records. MCL 600.2950(1)(h) provides that the court may restrain a respondent from:

> "Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and

> petitioner's minor child or about petitioner's employment address."

MCL 380.1137a prohibits a school from releasing the foregoing information protected by a PPO, as follows:

> "If a school district, local act school district, public school academy, intermediate school district, or nonpublic school is the holder of records pertaining to a minor pupil, if a parent of the minor pupil is prohibited by a personal protection order . . . from having access to information in records concerning the minor pupil that will inform the parent about the minor's or other parent's address or telephone number or the other parent's employment address, and if the school district, local act school district, public school academy, intermediate school district, or nonpublic school has received a copy of the personal protection order, the school district, local act school district, public school academy, intermediate school district, or nonpublic school shall not release that information to the parent who is subject to the personal protection order."

If the PPO limits a respondent's access to children's records, the court should issue sufficient copies to the petitioner for distribution to those schools or care providers who hold records containing the petitioner's address.

3. Name Changes

In a proceeding for a name change under MCL 711.1, the court may order for "good cause" that no publication of the proceeding take place and that the proceeding be confidential. "Good cause" includes evidence that publication or availability of a record could place the person seeking a name change or another person in physical danger, such as evidence that these persons have been the victim of stalking or an assaultive crime. MCL 711.3(1).

It is a misdemeanor for a court officer, employee, or agent to divulge, use, or publish, beyond the scope of his or her duties with the court, information from a record made confidential under MCL 711.3(1). MCL 711.3(3). Disclosures under a court order are permissible, however. MCL 711.3(3).

D. Avoid Civil Compromise

Strictly speaking, a PPO action is a "civil" proceeding. Nonetheless, a PPO typically addresses criminal behavior and so is different in nature from other "civil" proceedings such as tort claims — the U.S. Supreme Court has characterized civil protection orders as an "anomalous use of the contempt power" to restrain criminal behavior. *U.S. v Dixon*, 509 US 688, 694 (1993). Accordingly, where criminal conduct is at issue between the parties, civil compromise is not appropriate. Criminal acts are not a subject for negotiation or settlement between the victim and perpetrator because the victim does not

have the responsibility for changing the perpetrator's criminal behavior. See Batterer Intervention Standards for the State of Michigan, §7.3C (January, 1999). The Batterer Intervention Standards appear in Appendix C.

For similar reasons, it is inadvisable to refer the parties in a PPO action to alternative dispute resolution services that require cooperative efforts to reach an agreed settlement addressing the abusive behavior. Such services typically include mediation, community dispute resolution, and arbitration. Besides being inappropriate to address criminal behavior, these services — which require equal bargaining power between the parties — cannot operate fairly in situations involving domestic violence. Abusers exercise control in violent relationship, and alternative dispute resolution services afford them a further opportunity to wield this control over their partners.* Alternative dispute resolution is better suited for situations not covered by the PPO statutes, such as neighborhood disputes.

*See Sections 2.4(B) and 10.6 on the use of mediation or arbitration in cases involving domestic violence.

Note: As discussed in Section 6.6(B), MCR 3.704 provides that voluntary dismissal of a PPO action may only be accomplished by a court order upon motion by the petitioner. The Advisory Committee for this chapter of the benchbook believes that this court rule prohibits stipulated dismissals under MCR 2.504(A)(1)(b).

E. Mutual Orders

Mutual protection orders are prohibited under Michigan's PPO statutes and court rules. If the court wishes to restrain each party from abusing the other by way of separate orders, it may only do so if there are separate applications and findings made in conformance with the statutes. MCL 600.2950(8), MCL 600.2950a(5), and MCR 3.706(B).

Michigan's prohibition on mutual protection orders is in accordance with federal law. Under 18 USC 2265(c), an order restraining the petitioner issued without separate application and fact finding as to each party will not be accorded full faith and credit in other U.S. jurisdictions. The portion of a mutual order that restrains the petitioner is eligible for full faith and credit only if: 1) the respondent filed a cross or counter petition, complaint, or other written pleading seeking a protection order; *and* 2) the issuing court made specific findings that each party was entitled to a protection order. The order restraining the respondent is entitled to full faith and credit regardless of whether the restraint on the petitioner meets the foregoing criteria.*

*See Section 8.13(B)(2) for more discussion of full faith and credit questions in this context.

At least one other jurisdiction has concluded that a prohibition on mutual protection orders is consistent with due process standards. In *Deacon v Landers*, 587 NE2d 395, 399 (Ohio App, 1990), the court held that a mutual order protecting the respondent issued without notice, separate application, or separate fact finding deprived the petitioner of due process.

Even if there are separate applications and findings made in conformance with the PPO statutes, problems can arise if the court issues separate protection orders that restrain each party. In case of a violation, enforcing police officers have no guidance as to who should be arrested. Police often do nothing in these cases, or arrest both parties, thus further victimizing the abused individual. Furthermore, an order protecting the respondent may label an abused individual as an abuser and send a message that the court will tolerate violence. Finn and Colson, *supra*, p 47.

> **Note:** The court has no authority under the Michigan PPO statutes to accept the parties' stipulation to a mutual protection order.

F. Do Not Order Counseling

A court has no authority under the PPO statutes to order counseling for either party upon issuance of a PPO. Some courts, particularly those without trained domestic violence victim advocates to assist them, provide information to parties about other service providers in the community. The Advisory Committee for this chapter of the benchbook recommends that courts following this practice make it clear to the parties that the court is providing them with information and not requiring them to seek outside help.

> **Note:** Traditional couples counseling or family therapy may endanger an abused individual. See Section 2.4(B). Moreover, some constitutional law scholars believe that civil orders mandating participation in counseling may infringe upon constitutionally protected rights of physical liberty and free expression. Counseling is properly ordered as a condition of release — a choice — for persons who face incarceration or other penalties. See Finn & Hylton, Using Civil Remedies for Criminal Behavior, p 18 (National Institute of Justice, 1994).

7.5 Constitutional Concerns with Ex Parte Orders

A. Due Process Concerns

Ex parte personal protection orders may give rise to legitimate due process concerns, particularly where they affect the respondent's parental relationships or property interests. The Michigan Court of Appeals has held that an ex parte personal protection order issued under MCL 600.2950(12) does not violate due process. *Kampf v Kampf*, 237 Mich App 377, 383-385 (1999). For further guidance on this question, it is also useful to consult decisions rendered in other jurisdictions and in other contexts.

The U.S. Supreme Court has held that a person may be deprived of a property right without prior notice to further an important state interest. In *Mathews v Eldridge*, 424 US 319 (1976), the Court held that an ex parte termination of

disability benefits did not violate due process. The Court characterized due process as a flexible concept, which calls for "such procedural protections as the particular situation demands," and ruled that due process does not always require a pre-deprivation evidentiary hearing. 424 US at 334, 349. To determine whether a pre-deprivation hearing was necessary, the Court applied a balancing test in which the state's interests were weighed against the individual liberty interests at stake. The Court held that ex parte deprivation of an individual's property interest may be justified by an exigent counterbalancing state interest, where an opportunity for a prompt post-deprivation hearing is provided. The Court identified three factors to consider in deciding whether due process requirements have been met in any situation where there has been a deprivation of private property by state action:

> "*First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 US at 335. [Emphasis added.]*

*See also *Mitchell v WT Grant Co*, 416 US 600, 616 (1974) and *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan,* 414 Mich 247, 267 (1982) (opinion of Justice Fitzgerald).

Like the U.S. Supreme Court, the Michigan Court of Appeals has also recognized that the state's interest in public safety may justify a summary deprivation of property rights. In *Gargagliano v Secretary of State*, 62 Mich App 1, 10 (1975), *Cameron v Secretary of State*, 63 Mich App 753, 756 (1975), and *Nicholas v Secretary of State,* 74 Mich App 64, 70 (1977), the Court of Appeals held that a driver's mental illness or dangerous driving record were extraordinary circumstances that justified the temporary ex parte suspension of a driver's license, where:

- The property owner's danger to the public has been determined in a reliable manner, preferably in a judicial setting; and
- The property owner has been afforded an adequate opportunity for a timely hearing after the deprivation of property.

In *Kampf v Kampf, supra*, the Michigan Court of Appeals applied the foregoing principles to a respondent's challenge to an ex parte domestic relationship PPO issued under MCL 600.2950(12). The Court disagreed with the respondent's contention that his due process rights to notice and an opportunity to be heard were violated by the ex parte proceeding. Citing *Mitchell v WT Grant Co, supra* and *Gargagliano v Secretary of State*, *supra,* the Court held that "[t]here is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued" *Kampf v Kampf, supra*, 237 Mich App at 383-384. The Court found that the following

provisions in the PPO statute were sufficient to meet constitutional due process standards:

- The petition for ex parte relief must be supported by a verified complaint, written motion, or affidavit alleging "immediate and irreparable injury, loss, or damage . . . from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued." 237 Mich App at 384, citing MCL 600.2950(12).
- The respondent has a right to bring a motion to terminate a PPO within 14 days of service or actual notice, with the right to an expedited hearing on the motion if the respondent is enjoined from purchasing or possessing a firearm and must carry one as a condition of employment. 237 Mich App at 384, citing MCL 600.2950(13)-(14).
- If the respondent violates the PPO prior to receiving notice of it, a police officer called to the scene of the violation must give the respondent an opportunity to comply with the PPO so that the respondent may avoid arrest. 237 Mich App at 385, citing MCL 600.2950(22).

Courts in Wisconsin, Illinois, New Jersey, Oklahoma, Minnesota, and Missouri have also rejected due process challenges to their states' proceedings for ex parte civil protection orders against domestic violence. In *Blazel v Bradley*, 698 F Supp 756, 764 (WD Wisc, 1988), a federal district court applied the *Mathews v Eldridge* factors to Wisconsin's statutory scheme and held that the due process clause requires *either* a pre-deprivation hearing *or* at least four minimum procedural safeguards, namely:

- Participation by a judicial officer;
- A prompt post-deprivation hearing;
- Verified petitions or affidavits containing detailed allegations based on personal knowledge; and
- Risk of immediate and irreparable harm.

For other state court decisions upholding ex parte civil protection order proceedings over due process objections, see: *State ex rel Williams v Marsh*, 626 SW2d 223, 232 (Mo, 1982); *Schramek v Bohren,* 429 NW2d 501, 505-506 (Wisc App, 1988); *Sanders v Shephard,* 541 NE2d 1150, 1155 (Ill App, 1989); *Grant v Wright*, 536 A2d 319, 323 (NJ App, 1988); *Marquette v Marquette*, 686 P2d 990, 996 (Okla App, 1984); and *Baker v Baker*, 494 NW2d 282, 288 (Minn, 1992).

To promote safety and protect the respondent's due process rights, the Advisory Committee for this chapter of the benchbook offers the following suggestions for cases where an ex parte PPO petition requests that the respondent be restrained from entering onto premises and contains factual allegations sufficient to support this form of relief:

- Grant the relief requested.

- To assure a prompt post-deprivation hearing, schedule the matter for a hearing as soon as possible after issuance of the order.
- To prevent the parties from manipulating the order, the court should make it as specific as possible. For suggestions in this regard, see Section 7.4(B).

For safety reasons, the Committee discourages court policies under which ex parte petitions requesting exclusion of the respondent from premises are automatically denied and scheduled for a later hearing without regard to the contents of the petition. When in doubt about granting ex parte relief affecting property or parental rights, some courts grant other types of relief (e.g., restraining kidnapping, assaulting, beating, molesting, etc.) and set a hearing regarding that portion of the petition giving rise to doubts (e.g., restraining entry onto premises).

B. The Right to Purchase and Possess Firearms

The Michigan Court of Appeals has held that firearms restrictions in a PPO do not unconstitutionally infringe on participation in hunting or other sporting events* because Const 1963, art 1, §6 does not protect the right to bear arms in the context of sport or recreation. *Kampf v Kampf*, 237 Mich App 377, 383 (1999).

*See Section 9.1 for more information on this issue.

In dicta, the Court in *Kampf* further expressed its belief that firearms restrictions in a PPO represent a reasonable exercise of the state's police powers:

> "Respondent has never argued that the restraint against his right to possess and purchase firearms has prohibited him from defending himself or the state. Even if respondent's argument is interpreted to implicate the right to bear arms, this Court has held that the right may yield to a legislative enactment that represents a reasonable regulation by the state in the exercise of its police power to protect the health, safety, and welfare of Michigan citizens. *People v Smelter*, 175 Mich App 153, 155-156 (1989). The PPO statute is clearly addressed to protecting the health, safety, and welfare of victims of domestic violence. Further . . . MCL 600.2950(2), specifically requires a petitioner to notify the court if a respondent must carry a firearm as part of his job. That provision permits the court to make a judgment regarding whether a PPO that would prohibit the respondent from possessing or purchasing a firearm would affect his constitutional right to defend the state. Therefore, any restriction on the right to bear arms is a reasonable exercise of the police powers of the state." 237 Mich App at 383, n 3.

7.6 Common Frustrations with PPOs

This section considers the court's responses to common situations that cause frustration in PPO proceedings. Because some of these situations arise from the complex nature of domestic violence, the reader may gain insight from reviewing the discussion in Chapter 1 along with this section. Some causes for unwillingness or inability to participate in court proceedings include coercion, ambivalence about the outcome of court proceedings, and lack of confidence that the court proceedings will stop the violence. These factors are discussed in Section 1.6(C).

A. The Petitioner Resumes Contact with the Respondent

A common frustration for court personnel arises when the court issues a PPO restraining the respondent from having contact with the petitioner, and the petitioner subsequently resumes contact with the respondent that violates the PPO. If the respondent faces contempt sanctions under these circumstances, the Advisory Committee for this chapter of the benchbook suggests that the following principles offer some guidance for dealing with the situation:

- Only the court can change a PPO; the parties cannot.
- The respondent may move to modify or terminate the PPO within 14 days after service or actual notice, or for good cause shown after the 14 days have elapsed. A hearing must be held within 14 days from the date the respondent files a request for modification or termination.* MCL 600.2950(13), (14), and MCL 600.2950a(10), (11).
- The PPO is directed to the respondent's behavior, not the petitioner's.
- Regardless of the petitioner's wishes for contact, the respondent has violated the PPO. The petitioner's invitation may mitigate the sanctions, but it is no defense to the violation.
- In deciding whether to mitigate sanctions, the court might inquire whether the petitioner actually consented to resume contact with the respondent, or whether the respondent coerced the petitioner to resume contact.
- Knowing and intentional false statements made in support of a PPO petition are subject to contempt sanctions. MCL 600.2950(24) and MCL 600.2950a(21). See also MCR 2.114(B), imposing contempt sanctions on false declarations in court papers generally. The PPO statutes are otherwise silent on contempt sanctions that may be imposed on petitioners. The Advisory Committee for this chapter of the benchbook suggests that courts exercise extreme caution in ordering contempt sanctions against petitioners who resume contact with respondents who are subject to "no contact" provisions in PPOs. Imposing contempt sanctions against individuals who have been coerced or threatened into such contact sends a clear message to abusers that their control tactics are tolerated by the court and are effective to maintain control over their partners.

*The hearing is expedited if the PPO restricts access to firearms and the respondent must carry a firearm as a condition of employment. See Section 6.7(B).

The court might forestall some of the problems caused when the parties resume contact by informing petitioners that if circumstances change, the court must modify the PPO to permit renewed contact with the respondent. Requiring the petitioner to return to request modification has several safety benefits. If the petitioner returns, the court can reassess the situation and make sure that resumed contact is the petitioner's free choice. Moreover, even though the court vacates a no-contact provision, it can still encourage non-violent behavior by continuing the no-abuse provisions in force. Finally, the court can stress to the petitioner that its door remains open if violence should resume after modification or termination of a PPO.*

*Finn & Colson, *supra,* p 53.

B. The Petitioner Abandons a PPO Proceeding

The following discussion addresses the court's response to three factors that cause petitioners to abandon court proceedings: **lack of information about or confidence in court processes; belief that the abuse will stop;** and **coercion by the abuser**. While the court ultimately has limited authority to deny a PPO petitioner the right to dismiss a PPO petition or terminate a PPO, it can adopt practices that will temper the influence of these factors on the petitioner's decision to abandon court proceedings.*

*On the factors discussed in this Section, see Ganley, *Domestic Violence: The What, Why & Who, as Relevant to Civil Court Cases,* Appendix C, p 24, in Lemon, Domestic Violence & Children (Family Violence Prevention Fund, 1995). A related discussion appears in Section 1.6.

1. Lack of Information or Confidence About Court Proceedings

Some abused individuals abandon court actions because they lack adequate information about court procedures or do not trust that the court's actions will be effective to stop the violence. The failure to understand the remedies available from the court (or to place trust in such remedies) can stem from many sources:

- Emotional and/or physical trauma, intimidation, poor reading skills, lack of education, or cultural barriers.
- Abusers who provide false information about court procedures or intercept phone calls or mail sent from the court.
- Inadequately trained justice system personnel, including police officers and prosecutors who fail to enforce PPOs.
- Delays in the court proceedings.

A court can forestall dismissals and terminations caused by the lack of information or trust in several ways:*

*See also Section 7.2 on making court proceedings accessible to unrepresented parties.

- Provide clear, written explanations of proceedings.
- Enlist the help of well-trained domestic violence victim advocates or court clerks.
- Take the lead in educating law enforcement agencies and prosecuting attorneys in its community about court procedures.
- Avoid first class mail service of court documents on the parties and witnesses to a PPO proceeding.

- To provide an opportunity for verbal explanation and response to the petitioner's questions, hold hearings on the record for ex parte PPO petitions in cases where there are barriers to a party's ability to understand the proceedings.
- Handle PPO proceedings expeditiously.

2. Belief the Abuse Has Stopped

In some cases, an abused individual abandons a court action due to a belief that the abuse has stopped. Alternatively, an abused individual may abandon legal proceedings against the abuser during a period of reconciliation in the hopes that the abuse will stop. Indeed, for some abused individuals, the mere initiation of a court action may at least temporarily achieve the desired goal of stopping the abuse so that they perceive no further need to proceed in court. Requests for dismissal or termination under these circumstances may be less frustrating to court personnel who understand that a person subject to abuse may need to make many attempts before breaking free from a violent relationship. Court personnel can best serve individuals who have reconciled with their abusers by clearly communicating that the court's door remains open if the violence resumes. Some courts also provide these individuals with information about community domestic abuse prevention services for future reference.

3. Coercion

Abusers employ various forms of coercion to convince their partners to abandon legal proceedings. Some abusers threaten physical harm to their partners who continue with court action or actually injure their partners so that they cannot continue. Other abusers threaten to initiate retaliatory court proceedings — some individuals abandon efforts to obtain court protection in order to prevent their abusers from initiating child custody or neglect proceedings against them.

*See also the lethality factors listed in Section 1.4(B).

The Advisory Committee for this chapter of the benchbook suggests that the court remain alert for the following factors that indicate possible coercion:*

- One attorney appearing in court to act on behalf of both parties to a relationship.
- The respondent's past violent history, if known.
- Serious allegations of violence.
- A criminal case pending against the respondent.
- A short time elapsed between the filing of the petition and the request for dismissal or termination.
- The respondent's appearance with or without the petitioner to file a request for dismissal or termination.
- A lack of credible reasons for the requested dismissal or termination.

If any of these factors is present (or any other suspicious circumstance), the Advisory Committee suggests that the court obtain more information about

the parties' situation before dismissing a petition or terminating a PPO. The court might take the following actions:

- Schedule a hearing on a motion to dismiss the petition or terminate the PPO to determine whether it was filed voluntarily.
- If the court is not certain of the reason for the petitioner's failure to appear at a hearing, continue the case and notify the petitioner of the continuation date. To avoid interference with mail service, the notice should be personally served, if possible.
- Notify a respondent appearing in the petitioner's absence that the court will not terminate the PPO or dismiss the petition unless the petitioner comes to court to request it in person.

  Note: MCR 3.704 provides that "[e]xcept as specified in MCR 3.705(A)(5) and (B),* an action for a personal protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order." However, MCR 3.707(A)(1)(b) provides that a respondent may file a motion to modify or terminate the personal protection order and request a hearing.

*MCR 3.705(A)(5) and (B) allow the court to dismiss a petition.

- Modify the PPO instead of terminating it so that the restraints against assaultive behavior are left in place.
- If the motion to dismiss or terminate is granted, advise the petitioner of the right to refile the petition.
- In dangerous circumstances, refuse to dismiss the petition or terminate the PPO. One Chicago judge refuses to vacate protection orders when a child has also been beaten by the respondent.*

*Finn & Colson, *supra*, p 28.

The Advisory Committee for this chapter of the benchbook further suggests that the court *not* respond to a request for dismissal or termination by referring the parties to mediation or otherwise attempting to have them jointly negotiate a settlement regarding the abusive behavior. The Advisory Committee notes that:

- Domestic violence frequently involves criminal behavior, which is never a subject for negotiation or settlement between the victim and perpetrator; and
- Domestic violence by nature involves the abuser's one-sided exercise of control over an intimate partner. Because mediation and negotiated settlement will operate fairly only if there is equal bargaining power between the parties, these dispute resolution devices may not adequately protect the safety of a person who is subject to domestic violence.*

*See Sections 2.4(B) and 10.6 on arbitration and mediation in cases involving domestic violence.

C. Petitioners Who File Repeated Petitions

Courts sometimes find it frustrating when a petitioner who has moved to dismiss a PPO petition or terminate a PPO later returns to court with a new petition. As noted above, this phenomenon can be understood in the context of the complex nature of domestic violence described in Chapter 1. Many

abusers are not physically violent on an ongoing basis. After a violent incident, some abusers will seek to win their partners back with a period of affectionate behavior and promises of reform, which are ultimately broken. Accordingly, an individual who files repeat PPO petitions may be doing so after sincere hopes that the violence will stop have proven false. Courts can best serve such individuals by understanding their situation and assuring them that the door to the courthouse remains open to protect them from violence.

*Finn & Colson, *supra,* p 28-29.

If the need for ex parte relief does not appear compelling, some courts deal with repeat petitioners by scheduling the parties for a hearing. In these cases, however, petitioners are told that they can return before the hearing date if there is renewed violence. In other courts, the judge grants the protection order ex parte if it appears warranted on its face and addresses the issue of repeat petitioning at a subsequent noticed hearing. The court might also consider limiting the ex parte relief granted to a restraint on assaultive behavior and holding a hearing as to other types of relief requested in the petition.*

In cases involving repeat petitions, the Advisory Committee for this chapter of the benchbook suggests that the court *not* refer the parties to mediation or otherwise attempt to have them jointly negotiate a settlement regarding the abusive behavior. The Advisory Committee notes that:

- Domestic violence frequently involves criminal behavior, which is never a subject for negotiation or settlement between the victim and perpetrator; and
- Domestic violence by nature involves the abuser's one-sided exercise of control over the victim. Because mediation and negotiated settlement will operate fairly only if there is equal bargaining power between the parties, these dispute resolution devices may not adequately protect the safety of a domestic violence victim.*

*See Sections 2.4(B) and 10.6 on arbitration and mediation in cases involving domestic violence.

D. Parties Who Alter the PPO

Because the form PPO prepared by the State Court Administrative Office lists the relief available in a "check the box" format, some Michigan courts report problems with parties who alter the PPO after issuance by checking additional boxes without court authorization. To manage this problem, the Advisory Committee for this chapter of the benchbook offers the following suggestions:

- On the copies of the form given to the parties, cross out any inapplicable provisions.
- Have the issuing judge initial any handwritten changes on the form.
- Remind the parties that alteration of the court's order is a felony, punishable by imprisonment for not more than 14 years. MCL 750.248.

7.7 PPOs and Access to Children

Because abusers often use the exercise of their parental rights as an opportunity for asserting control over their intimate partners, there is a strong link between safety and the abuser's access to children. This link is recognized in MCR 3.207(A), which states that a circuit court in a domestic relations case may issue both "ex parte and temporary orders with regard to any matter within its jurisdiction" and "[personal protection] orders against domestic violence." This court rule anticipates that child custody (and other) disputes in cases where domestic violence is present can generally be resolved most safely and effectively if the same judge presides over all the proceedings between the same parties. See also MCR 3.703(D)(1)(a), under which a PPO filed in the same court as another action between the parties must be assigned to the same judge who heard the prior action. In *Brandt v Brandt*, 250 Mich App 68, 71-72 (2002), a PPO and subsequent divorce proceeding were assigned to the same judge. The Court of Appeals approved of this procedure, stating that it "allows the judge to be intimately familiar with all the proceedings involving the parties." 250 Mich App at 72. The Court of Appeals also recommended issuing duplicate orders in concurrent domestic relations and PPO proceedings and placing a copy of such orders in each case file. *Id.*

Unfortunately, it is not always possible for one court to meet all the needs of the parties to a violent relationship because persons subject to domestic violence often flee their homes seeking refuge. If such individuals flee after a domestic relations action has been initiated, fear of the abuser may prevent them from seeking relief in the court where the action is pending. If flight occurs before a domestic relations action is initiated, it may be difficult to obtain complete relief from the domestic relations court in the refuge county until the applicable residency requirements are met.* To protect individuals in flight from abuse, MCR 3.703(E)(1) permits petitioners to file PPO actions involving respondents age 18 or over in any county in Michigan. If there is a pending action between the parties or a prior judgment or order entered in another court, MCR 3.703(D)(1)(b) provides that where practicable, the court in the PPO action should not issue an order until it has contacted the prior court to determine any relevant information. If the prior action addressed a child custody or parenting time matter, MCR 3.706(C)(1) requires the court in the PPO action to contact the prior court as provided in MCR 3.205. This rule further directs that where practicable, the judge in the PPO action should not issue an order without first consulting with the prior judge regarding the impact of the PPO on custody or parenting time rights. If a PPO is issued, it takes precedence over any existing custody or parenting time order until it expires, or until the court with jurisdiction over the custody or parenting time order modifies that order to accommodate the conditions of the PPO. MCR 3.706(C)(3).

*In divorce actions, either party must have resided in Michigan for at least 180 days and in the county of filing for at least 10 days before filing. MCL 552.9(1).

> **Note:** MCR 3.205 provides for the exchange of information between courts exercising concurrent jurisdiction in actions affecting minors. With regard to the subsequent court's authority to act, MCR 3.205(A) provides: "If an order or judgment has

provided for continuing jurisdiction of a minor and proceedings are commenced in another Michigan court having separate jurisdictional grounds for an action affecting that minor, a waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court." This rule indicates that a domestic relations court's continuing jurisdiction over a minor should not prevent another circuit court from exercising jurisdiction on separate grounds over a subsequent PPO proceeding affecting the minor. See *Krajewski v Krajewski*, 420 Mich 729, 734-735 (1984); *In re Toth*, 227 Mich App 548, 552 (1998); *In re Foster*, 226 Mich App 348, 357 (1997); and *In re DaBaja*, 191 Mich App 281, 289-290 (1991), which permitted probate courts to exercise jurisdiction in abuse/neglect and adoption proceedings involving minors who were also subject to continuing circuit court jurisdiction as a result of prior divorce actions. See, however, MCR 3.205(C)(2), which provides that "[a] subsequent court must give due consideration to prior continuing orders of other courts, and may not enter orders contrary to or inconsistent with such orders, except as provided by law."

Although it provides needed protection for some victims of domestic violence, the concurrence of authority in related proceedings in different courts can be problematic. PPO and domestic relations actions in separate courts can result in conflicting orders issued in each court, which are difficult for police to enforce. Moreover, conflicting orders permit unscrupulous parties to manipulate the court system to the disadvantage or physical peril of others. This section explores the statutory and court rule provisions that may help a court in cases involving concurrent domestic relations and PPO proceedings, along with the policy and practical concerns that can inform its decision-making.

A. Authority to Regulate Access to Children in a PPO

The difficulty in delineating a clear boundary between a PPO and a domestic relations order emanates from the close connection between abusive behavior and the practical issues of support and child custody that must necessarily be addressed in any domestic relations action. Abusers use disputes over custody and support as opportunities to assault, harass, intimidate, and otherwise control their intimate partners. The presence of violence in a domestic relations action thus creates tension between PPO and domestic relations proceedings under the exigent circumstances that often accompany domestic abuse. The expedient issuance and enforcement procedures that promote safety in a PPO action do not offer the best context in which to make the informed factual findings that must accompany a determination of a child's best interest in a custody or parenting time proceeding. Nonetheless, the Court of Appeals has approved of the entry of a PPO affecting a respondent's access to his children pending the filing of a domestic relations action. In *Brandt v Brandt, supra* at 69-70, the Court rejected the respondent's contention that the "best interests of the child" factors contained in the Child Custody Act, MCL

722.21 et seq., must be examined before making any custody or parenting time determination. The Court stated:

> "Respondent is correct that MCL 722.23 enumerates several factors for a court to use to determine the best interests of the children involved in a custody dispute. Nonetheless, we do not believe that these factors were required to be applied in the instant case. The trial court was not making a custody determination, instead, the trial court was simply issuing an emergency order, which was essentially an award of temporary custody of the children to petitioner, while granting respondent parenting time until the divorce proceeding was initiated so that the children might be protected from physical violence or emotional violence or both inflicted on them by respondent."

The tension between a PPO action and a domestic relations proceeding is most acute in situations where a court is requested to issue a PPO that would affect parental rights by excluding the respondent from premises under MCL 600.2950(1)(a), or by limiting access to children's records under MCL 600.2950(1)(h). Such orders will necessarily affect the respondent's access to children; indeed, orders excluding the respondent from premises have a profound impact on parental rights if the respondent is a custodial parent living in the family home. Because a PPO takes precedence over an existing custody or parenting time order under MCR 3.706(C)(3),* an order excluding the respondent from premises or limiting access to records may also affect a noncustodial parent with court-established parental rights. Thus, as a purely practical matter, the statute and court rule give the court in a PPO action concurrent authority with a domestic relations court to limit a parent's access to children. Having granted this power, however, the statute offers scant guidance as to its exercise, leaving the parameters of the PPO proceeding undefined.

*MCR 3.706(C)(3) is quoted in full at Section 6.5(B)(5). See also Section 12.5(B) on the effect of a PPO on the established custodial environment in a proceeding to modify a custody order.

As a starting point for resolving the tension between PPO actions and domestic relations proceedings, it is helpful to recall that these two types of proceedings are designed to meet the needs of parties in distinct situations.* The expedited issuance and enforcement procedures of a PPO action are tailored for situations — often emergencies — in which acts of domestic abuse threaten to interfere with personal liberty or cause a reasonable apprehension of violence. See MCL 600.2950(1)(j). Domestic relations proceedings generally anticipate non-violent situations in which the parties require court assistance to regulate child custody, support, or property matters pending entry of the final judgment in the case. Given these basic differences in purpose, the threshold question in PPO proceedings affecting access to children is whether the situation involves acts imposing upon or interfering with personal liberty, or causing a reasonable apprehension of violence. Absent these circumstances, a PPO is not appropriately used to address the parties' parental rights.

*For comparison of the specific features of PPOs and domestic relations orders under MCR 3.207, see Section 10.7.

If a PPO petition meets the foregoing threshold requirements in requesting an order that would interfere with parental rights, the next (and more difficult)

question involves the scope of available relief. The court is clearly empowered to exclude a respondent from premises under MCL 600.2950(1)(a). Having determined that such a measure is necessary to protect the petitioner in a particular case, however, the question remains whether the PPO court may also refine its order by specifying conditions for the respondent's access to children living on the premises. The provisions of the domestic relationship PPO statute that specifically address access to children do not completely resolve this question:

- MCL 600.2950(1)(h) permits restraint on the respondent's "access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."
- MCL 600.2950(1)(f) permits the court to restrain the respondent from "[i]nterfering with petitioner's efforts to remove petitioner's children . . . from premises that are solely owned or leased by the individual to be restrained or enjoined." This provision is designed to prevent abusers from detaining or concealing their partners' children on their solely owned or leased premises.
- MCL 600.2950(1)(d) permits the court to restrain the respondent from "[r]emoving minor children from the individual having legal custody of the children, *except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction*." [Emphasis added.] It is unclear whether the emphasized "except" clause is directed to the respondent or to the court issuing the PPO. If directed to the respondent, the clause would authorize the court to mandate the parties' obedience to a preexisting order without restricting its ability to issue a PPO with inconsistent provisions. If directed to the court, the clause would forbid the issuance of a PPO preventing the respondent from removing children in accordance with a prior order. However construed, this provision does not address abusive behavior other than removal of children from the custodial parent. Moreover, the provision is problematic in its failure to address prior custody or parenting time orders issued by courts that were not cognizant of the parties' violent relationship. It also fails to account for the possibility that the level of violence between the parties may have escalated after the issuance of the prior custody or parenting time order.

The general "catch-all" provision in MCL 600.2950(1)(j) is the only statutory authority that has been construed to address abusive parental behavior other than entering premises or removing children from their custodial parent. This provision permits the court to restrain "[a]ny other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." Although "specific acts" involving the exercise of parental rights are not specifically mentioned, it is not difficult to imagine conduct that would fall within the purview of this provision. In a study of civil protection orders issued in three jurisdictions other than Michigan, the National Center for State Courts reported that petitioners with children frequently reported abusers' threats not to return children after visitation and incidents of physical or verbal abuse occurring during the exchange of children for visitation.*

**Civil Protection Orders: The Benefits & Limitations for Victims of Domestic Violence*, p 51, n 95 (Nat'l Center for State Courts, 1997).

In *Brandt v Brandt, supra* at 69, the trial court entered a PPO prohibiting the respondent from contacting his children. The trial court later modified the PPO to allow the respondent parenting time with his children. The respondent argued on appeal that the trial court did not have the authority to modify a PPO to include parenting time. The respondent asserted that custody and parenting time determinations may only be made in a child custody proceeding after a court has examined the "best interests of the child" factors. The Court of Appeals upheld the trial court's order, indicating that a trial court may restrain individuals from doing certain acts under MCL 600.2950(1). The Court further stated that MCL 600.2950(1)(j), the "catchall" provision, clearly provides a trial court with the authority to restrain a respondent from any action that "interferes with personal liberty" or might cause "a reasonable apprehension of violence." 250 Mich App at 70. The Court stated:

> "This statutory provision allows the trial court to restrain respondent from 'any other specific act or conduct . . . that causes a reasonable apprehension of violence.' [MCL 600.2950(1)(j)]. There is no question that it would be reasonable for petitioner to fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. Additionally, this interpretation is entirely consistent with the remainder of the statute, which makes it clear that the Legislature recognized that access to the children may need to be restrained to protect the safety of a parent. See MCL 600.2950(1)(d), (f) and (h)." 250 Mich App at 70–71.

The respondent also argued that there was no statutory basis to restrain his contact with his children because the petitioner did not allege that the respondent was violent towards the children. The Court of Appeals disagreed, finding that the petitioner did not need to allege that the respondent was physically violent towards the children. The petitioner's allegations that the respondent was physically violent toward her while in the children's presence and was becoming increasingly more violent provided a sufficient basis for the trial court to enter an order that included prohibiting contact with the children. 250 Mich App at 71.

Many PPOs — particularly those excluding the respondent from premises and restricting access to children's records — affect access to children as a practical matter. Particularly in emergencies where the respondent poses a grave danger to the petitioner, there are reasons for the PPO court to acknowledge the impact of its order on access to children and to incorporate specific provisions governing the exercise of parental rights:

Civil Protection Orders, supra. See Section 12.7(B) on the need for specificity in orders for parenting time.

- Because violence often occurs when the parties to an abusive relationship meet to exchange their children, it may be unsafe to enforce court orders for custody or parenting time that require them to do so. There are also serious safety concerns with vague, easily manipulable orders for "reasonable parenting time" or "parenting time to be arranged by the parties."* MCR 3.706(C)(2) authorizes the court to take safety into account in a PPO action initiated after the issuance of a custody or parenting time order. It provides: "If the respondent's custody or parenting time rights will be adversely affected by the [PPO], the issuing court shall determine whether conditions should be specified in the order which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions."
- In emergency situations, it may not be practicable for the parties to a PPO action to participate in a separate domestic relations action to address the respondent's access to children. Such emergencies may include cases where it would endanger the abused individual to return to the county where a prior domestic relations order was issued.

*See Section 10.7 for a comparison of these remedies.

- Violations of domestic relations orders governing access to children do not subject the offender to warrantless arrest, or to the other expedited enforcement procedures for PPOs.*

  Note: Protection order statutes in many other states specifically permit courts to make provision for emergency support and custody within a civil protection order against domestic violence. These orders are entitled to full faith and credit under 18 USC 2265 and 2266(5). See Section 8.13(B)(1).

B. Suggested Procedures for Cases Where a PPO Affects Access to Children

Trial courts can take the following steps to promote safety and prevent manipulation of the system:

*See Section 12.7 on safe terms for parenting time. On screening for domestic violence, see Sections 10.2-10.3 and Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Chapter 2.

- If a custody or parenting time order contains terms that adequately provide for safety in cases involving domestic violence, the court in a subsequent PPO action will be able to incorporate them into its order without making major changes. Accordingly, domestic relations courts should screen for violence in contested cases, so that orders issued will contain provisions that are appropriate for the parties' situation.*
- A court with complete information about the parties will be better able to recognize manipulative behavior. Thus, wherever possible, the courts in PPO and domestic relations proceedings should share information as required by the court rules. Information-sharing can also reduce the incidence of conflicting orders. MCL 600.2950(15)(f) and MCL 600.2950a(12)(f) require the clerk of the court that issues a PPO to provide the following notice immediately upon issuance, without requiring proof of service:

  > "If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify

the friend of the court for the county in which the information is located about the existence of the personal protection order."

See also MCR 3.205 and 3.706(C)(1) for information-sharing requirements.

- A PPO should only address access to children on a temporary basis in emergency situations. Long-term resolution of disputes over access to children must be sought in a domestic relations proceeding. See MCR 3.706(C)(3) and *Brandt, supra* at 70.
- Important due process requirements attach in any case involving limitations on a party's parental rights. To protect these rights, the court in a PPO or a domestic relations proceeding should schedule a prompt post-deprivation hearing after issuing relief on an ex parte basis. See Section 7.5(A) for more discussion of this question.
- If possible and safe, the court issuing a PPO might attempt to accommodate the requirements of a prior custody or parenting time order. For example, if a custody order requires that children have weekly visits with a respondent who may not have contact with the children's custodial parent, the PPO might provide that the weekly visits take place in such a manner that the parents do not have to meet. See MCR 3.706(C)(2), providing that the court issuing a PPO "shall determine whether conditions should be specified . . . which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions."